The Malayan Law Journal

1985

REPORTS
OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE SUPREME COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, THE COURT OF APPEAL OF NEGARA BRUNEI DARUSSALAM, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

THE "VIRGINIA RHEA"; CHINA STEEL CORPORATION & ANOR. v. THE "VIRGINIA RHEA", OWNERS OF

[C.A. (Kulasekaram, Lai Kew Chai & Abdul Wahab Ghows JJ.) October 2, 1984]

[Singapore – Civil Appeal No. 79 of 1982]

Practice and Procedure – Pleadings – Amendment of – Claim by owners or consignees of goods on board vessel – Alternative claim as indorsees or holders of bills of lading – Amendment adding new bill of lading – Whether arising out of same facts – Principles of amendment – R.S.C. 1970, O.20 rr.1(1), 4(2) & 5(5).

The issue in this appeal concerns an amendment made by the appellants under O.20, r.1(1) of the Rules of the Supreme Court, 1970. On October 22, 1980 they issued a writ *in rem* against the respondents and claimed as the owners or consignees of goods shipped on board the respondents' vessel "Virginia Rhea" or alternatively as indorsees or holders of four bills of lading identified by their numbers. On November 21, 1981 the appellants inserted the amendment, *i.e.* the words "and KKS 33" in the indorsement of the writ under O.20, r.1(1) of the Rules. In the High Court, Rajah J., in allowing the respondents' appeal, ordered that the amendment be struck out ([1983] 1 M.L.J. 198). The appellants appealed against that decision.

Held, dismissing the appeal: (1) generally, all amendments ought to be allowed "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings";

(2) it was plain that the amendment would introduce an entirely new cause of action in that it could not be said that it had arisen out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed by the appellants;

(3) a claim under bill of lading "KKS 33" could not be inferred. The appellants had failed to bring themselves within the scope of paragraph (5) of O.20, r.5. The appellants were out of time in asserting their claim.

Case referred to:

(1) *G.L. Baker Ltd.* v. *Medway Building & Supplies Ltd.* [1958] 1 W.L.R. 1216, 1231.

COURT OF APPEAL.

Denis Murphy (*Miss Vivien Ang* with him) for the appellants.

G. Pannirselvam for the respondents.

Cur. Adv. Vult.

Lai Kew Chai J. (delivering the Judgment of himself and **Abdul Wahab Ghows J.**): This was an appeal against the decision of Rajah J. who, in allowing the Respondents' appeal, ordered that the words "and KKS 33" in the indorsement of the Writ (hereinafter referred to as "the amendment") which were amended by the Appellants be struck out. The Court of Appeal, of which we were members, unanimously dismissed the appeal. We now set our own reasons as we are not able to discuss our draft with our brother Judge, Kulasekaram J., who had presided and who has since retired.

On October 22, 1980 the Appellants issued a Writ *in Rem* against the Respondents. The Appellants claimed as the owners or consignees of goods shipped on board the Respondents' vessel, "Virginia Rhea" or, alternatively, as indorsees or holders of four bills of lading which were identified by their numbers. On November 21, 1981 the Appellants inserted the amendment under Order 20 rule 1(1) of The Rules of The Supreme Court, 1970 (hereinafter referred to as "the Rules") without leave of court.

In considering the validity of the amendment, we were required by Order 20 rule 4(2) to see what we would have done if an application for leave to make the amendment had been made under Order 20 rule 5 at the date when the amendment was made. In other words, it was necessary for us to consider the ambit of Order 20 rule 5. The relevant provision of rule 5 for the purposes before us was paragraph (5). However, we think it

is necessary for us to set out all the paragraphs of Order 20 rule 5 to appreciate the context in which paragraph (5) appears.

Order 20 rule 5 provides:—

"(1) Subject to the following provisions of this Rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the court for leave to make the amendment mentioned in paragraphs (3), (4) and (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

We should begin by saying a few prefatory words about the principles governing a court's power to grant an amendment and about Order 20 rule 5. Generally, all amendments ought to be allowed "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings": *per* Jenkins, L.J. in *G.L. Baker Ltd.* v. *Medway Building & Supplies Ltd.*[1] In addition, it is particularly germane for our purposes to state that if an applicant has from the beginning formulated his writ which, though defective in some respect, falls within any of the circumstances set out in paragraphs (3), (4) or (5) of Order 20 rule 5, no question of depriving any defence of time bar arises. The defects, if permitted by a court to be cured, will be treated as having been cured from the beginning.

An analysis of the scope of each of paragraphs (3), (4) or (5) will make this even clearer. Paragraph (3) deals with a mistake over the description of the identity of a party to the proceedings. Two conditions have to be satisfied to trigger its operation. First, the mistake must be a genuine mistake. That should be an easy question to decide. Secondly, the mistake is not misleading or such as to cause any reasonable doubt as to the identity of the person as a plaintiff or a defendant. The underlying thrust of the paragraph is that in truth and in substance the litigant is known, although there is a nominal defect in form. If an amendment is allowed, even if allowed after any relevant period of limitation current at the date of the issue of the Writ has expired, what has been done is in effect a mere correction of the nomenclature with which the party is labelled. The other party at all material times knew in fact and in substance who the opposing litigant was.

Similarly, with regard to paragraph (4), it allows an alteration of the capacity in which a party sues if the capacity in which, if the amendment is made, the party will sue is one in which he might have sued at the date at which the claim was asserted. Again, the amendment is nominal.

Paragraph (5) is even more poignant in underscoring the trend towards giving effect to substance rather than to form. It recognises the existence of a set of facts for which relief is claimed to admit the addition or even substitution of a so-called "new" cause of action after the expiry of the limitation period.

What is common in all three paragraphs is this. For an application to come within any of the paragraphs, there must already be asserted in the Writ or the pleading a set of allegations which, in spite of the expiry of the limitation period, reasonably identify the party suing or sued, which is capable of conveying the capacity of the party to sue or which permits the addition or substitution of another cause of action. In other words, the matters of identity, capacity or cause of action are already asserted or implied, from the inception of the Writ or the filing of the pleading and it is merely a matter of correction to make explicit what is implicit.

The position is clearly and ably set out by the editors of *The Supreme Court Practice* [1982] Volume 1 at 20/5-8/7 in the following terms:—

"The principle underlying the new powers of the court under Rule 5 is that if the proceedings had been, from the

beginning, properly formulated or constituted in the circumstances specified in paragraphs (3), (4) or (5), the defence of the Statute of Limitations would not have been available to the defendant; and accordingly, if in its discretion, the court thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in these paragraphs, so that such defects in the proceedings are treated as having been cured *ab initio*, the defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place. To contend in the cases specified in these paragraphs, that the defendant has an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the court will not use its powers to amend under Order 20, rule 8, and Order 15 rules 6, 7 and 8 (see per Holroyd Pearce, L.J., in *Pontin* v. *Wood* [1962] 1 Q.B. at page 609.)"

It was plain to us that the amendment would introduce an entirely new cause of action in that it could not be said that it had arisen out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed by the Appellants. The Appellants had claimed as the indorsees or holders for value of and under four bills of lading which were numbered as KKS1, KKS3, KKS31 and KKS32 which were all dated October 10, 1979. The four claims were all in respect of four contracts of carriage by sea, the rights and title of which could be passed under the Bill of Lading Act, 1855. The mention of these contracts could not necessarily imply that there could be another claim of the Appellants under or in respect of another contract of carriage under another bill of lading which need not be identified; as such a claim would be implicit in or inferred from the endorsement in the writ under consideration. We were not unmindful that the amendment only sought to introduce a contract of carriage which was made for the same voyage by the same vessel and that the bill of lading bore the same date. We had also looked at the entire endorsement in the writ to see if a claim under bill of lading "KKS33" could be inferred. We could not stretch it to include such a claim. We were therefore of the view that the Appellants had failed to bring themselves within the scope of paragraph (5) of Order 20 rule 5. The Appellants were out of time in asserting their claim.

For the foregoing reasons, we for our own part agreed with the other member of the Court of Appeal and dismissed the appeal.

Appeal dismissed.

Solicitors: *Godwin & Co.; Drew & Napier.*

THE "EPAR"

THE "EPAR", OWNERS OF CARGO LADEN ON v. THE "EPAR", OWNERS OF

[O.C.J. (Kulasekaram J.) June 13, 1984]

[Singapore – Motion in Admiralty Suit No. 158 of 1980]

Shipping Law – Bills of lading – Claim for damage to cargo – Dispute as to convenient forum – Effect of exclusive choice of jurisdiction clause – Carriage of Goods by Sea Act, 1972, ss. 2 & 3, Arts. I, III, IV & X of Schedule.

Shipping Law – Bills of Lading – Application of Hague-Visby Rules.

Practice & Procedure – Application for stay of proceedings – Court's discretion.

Interpretation – Act and Rules scheduled to it – Adoption of purposive construction.

By a contract of carriage contained in 3 bills of lading dated June 27, 1978, the defendants contracted to carry on board the "Epar" 349 pallets of oil well drilling muds duly delivered to the defendants in good order and condition at Singapore and from thence to Belawan, Indonesia.

The present action arose as a result of the plaintiffs' claim against the defendants for damage done to 53 pallets of the said cargo. The defendants entered an unconditional appearance and contended, *inter alia*, that all further proceedings be stayed on the grounds that Indonesia was the more convenient forum and that the plaintiffs had agreed to submit all disputes arising from the said agreement for determination to the Court of Djakarta. The defendants relied on clause 17 of the bills of lading which states, "Any claim for loss, damage or short delivery or otherwise, arising out of this B/L, shall be dealt with, at the option of Pelayaran Nasional Indonesia in the court (Pengadilan Negeri) of Djakarta, to the exclusion of proceedings in any other court".

It was not disputed that if effect were given to the exclusive choice of jurisdiction clause and the claim was disputed in the court in Djakarta the maximum liability of the carrier to the shippers would be limited to a much smaller sum than what they would be liable to in Singapore under the Hague-Visby Rules.

Held, dismissing the defendants' application: (1) art. X r.1(a) and (b) of the Hague-Visby Rules apply to all bills of lading issued in Singapore;

(2) when a dispute arises between the parties as to their respective legal rights and duties under the contract and the dispute is one concerning the negligence, fault or failure of the carrier which they are unable to resolve by agreement and the carrier seeks to bring the exclusive jurisdiction clause into operation and to rely upon it and it is shown or accepted that the court in Djakarta – the chosen exclusive jurisdiction – would apply domestic substantive law which would result in limiting the carrier's liability to a lower sum than that to which he would be subjected under art. IV r.5(a) in Singapore, then art. III r.8 will come into play and the exclusive jurisdiction clause will be treated as if of no effect.